

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.
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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CBS BROADCASTING INC., et  
al.,

Petitioners,

v.

SUPERIOR COURT OF LOS  
ANGELES COUNTY,

Respondent;

TOP KICK PRODUCTIONS, INC.,  
et al.,

Real Parties in Interest.

B292277

(Los Angeles County  
Super. Ct. No. BC692372)

**ORDER MODIFYING OPINION  
(NO CHANGE IN JUDGMENT)**

IT IS ORDERED that the opinion filed on February 21, 2019  
and not certified for publication, be modified as follows:

On page 10, insert as the last paragraph to read as follows:

“Petitioners shall recover their costs on appeal.”

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ZELON, Acting P. J.,

SEGAL, J.,

FEUER, J.



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(Los Angeles County  
Super. Ct. No. BC692372)

ORIGINAL PROCEEDING. Petition for writ of mandate,  
David Sotelo, Judge. Petition for writ of mandate granted.

Manatt, Phelps & Phillips, LLP and John M. Gatti,  
Benjamin G. Shatz, Emil Petrossian, and Lauren J. Fried for  
Petitioners.

No appearance for Respondent.



Baute Crocheteire & Hartley, LLP, Mark D. Baute, Scott J. Street, and Artyom Baghdishyan for Real Parties in Interest.

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Plaintiff and real party in interest Top Kick Productions Inc., filed a motion to disqualify counsel for petitioners and defendants CBS Broadcasting Inc. and CBS Corporation. Before the trial court heard the disqualification motion, CBS filed a petition to compel arbitration and a motion to stay the litigation pursuant to California Code of Civil Procedure section 1281.4. CBS challenges the trial court's denial of its stay request; we agree that the trial court erred.

### **FACTUAL BACKGROUND**

Top Kick Productions, Inc. (Top Kick) is a production company owned by actor Chuck Norris. The company produced the hit television show *Walker, Texas Ranger (Walker)*, which starred Norris. In 1993, Top Kick entered into a distribution agreement with CBS Broadcasting Inc. and CBS Corporation (CBS) under which CBS agreed to pay Top Kick 20 percent of profits earned from the exploitation of *Walker*. Under the agreement, CBS was required to issue quarterly statements and Top Kick was entitled to audit CBS's books.

Top Kick initiated its first audit between 1995 and 1997 and its second audit in 2011. The parties resolved both disputes with settlement agreements containing arbitration clauses. The 1999 agreement provides: "CBSP and Artist/Top Kick agree that with respect to any subsequent audit disputes, the parties will submit such matters to arbitration in accordance with procedures to be negotiated in good faith." The July 2011 agreement states that "any disputes arising under this Settlement Agreement



(including, without limitation disputes regarding its enforcement or interpretation) shall be subject to binding arbitration under the auspices of JAMS in Los Angeles, California.” In April 2016, Top Kick initiated a third audit, which led to the current litigation.

Top Kick filed its first amended complaint for breach of contract, breach of implied covenant of good faith and fair dealing, and accounting against CBS and Sony Pictures Television, Inc on April 8.<sup>1</sup> The complaint alleges, in relevant part, that CBS breached the parties’ 23 percent profit agreement by failing to report and pay collected monies to Top Kick. The parties extended litigation deadlines to accommodate two rounds of mediation. Both were unsuccessful.

On June 20, after the mediation proceedings, Top Kick filed a motion to disqualify attorney John M. Gatti and the law firm Manatt, Phelps & Phillips LLP from representing CBS. Top Kick argued that, while working at his prior law firm, Gatti represented Top Kick in a dispute with CBS related to *Walker* and was privy to confidential information.

On August 8, with the disqualification motion pending, and while the parties continued settlement discussions, CBS filed a petition to compel arbitration under Code of Civil Procedure section 1281.2.<sup>2</sup> On August 10, CBS filed an *ex parte* motion to stay all proceedings pending a ruling on the petition to compel arbitration. On the same day, Top Kick filed a competing *ex parte* application asking the trial court to hear its disqualification motion before the petition to compel.

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<sup>1</sup> Sony is not a party to this writ proceeding.

<sup>2</sup> Statutory references are to the Code of Civil Procedure.



The trial court granted Top Kick’s request to hear the disqualification motion first and denied CBS’s request for a stay under section 1281.4. CBS brought this petition for a writ of mandate challenging the ruling. We granted a temporary stay and issued an order to show cause to determine whether the trial court abused its discretion in denying the motion for a stay filed under section 1281.4.

## DISCUSSION

### *A. The Standard of Review*

Reviewing courts apply the abuse of discretion standard in determining whether the court erred in denying a motion to stay. (*Cardiff Equities, Inc. v. Superior Court* (2008) 166 Cal.App.4th 1541, 1548, citing *Henry v. Alcove Investment, Inc.* (1991) 233 Cal.App.3d 94, 101 [controversy ordered to arbitration pursuant to section 1281.2 and stay imposed].) Where the trial court exercises discretion the law does not provide, it abuses its discretion. (*Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal.App.4th 772, 782). “The scope of discretion always resides in the particular law being applied, i.e., in the ‘legal principles governing the subject of [the] action. ...’ Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an ‘abuse’ of discretion.” [Citations.]” (*MacQuiddy v. Mercedes-Benz USA, LLC* (2015) 233 Cal.App.4th 1036, 1048, citing *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 148–149.)

### *B. The 1281.4 Stay is Mandatory*

The “rules of statutory construction require us to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law. [Citation.] We first examine the words themselves because the



statutory language is generally the most reliable indicator of legislative intent. [Citation.] The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context.” (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.)

Section 1281.4 states, in pertinent part, that: “If an application has been made to a court of competent jurisdiction, whether in this State or not, for an order to arbitrate a controversy which is an issue involved in an action or proceeding pending before a court of this State and such application is undetermined, the court in which such action or proceeding is pending shall, upon motion of a party to such action or proceeding, stay the action or proceeding until the application for an order to arbitrate is determined and, if arbitration of such controversy is ordered, until an arbitration is had in accordance with the order to arbitrate or until such earlier time as the court specifies.” (Code Civ. Pro. § 1281.4.)

The use of the word shall in the statute imposes a mandatory duty. “It requires that the trial court stay an action pending before it while an application to arbitrate the subject matter of the action is pending in a court of competent jurisdiction.” (*Twentieth Century Fox Film Corp. v. Superior Court* (2000) 79 Cal.App.4th 188, 192 [holding that the trial court acted in excess of its authority by denying the motion for a stay pending a petition to compel arbitration.]) (See *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443 [the word “shall” is ordinarily construed as mandatory, while “may” is ordinarily construed as permissive].)

“The purpose of the statutory stay is to protect the jurisdiction of the arbitrator by preserving the status quo until



arbitration is resolved.” [Citation.] ‘In the absence of a stay, the continuation of the proceedings in the trial court disrupts the arbitration proceedings and can render them ineffective.’ [Citation.]” (*Heritage Provider Network, Inc. v. Superior Court* (2008) 158 Cal.App.4th 1146, 1152.)

Section 1281.4 requires the trial court to impose a stay when litigants meet two requirements. First, the party seeking to enforce a contractual arbitration clause must file a section 1281.2 petition to compel arbitration. (*Brock v. Kaiser Foundation Hospitals* (1992) 10 Cal.App.4th 1790, 1795–1796.) Second, the party seeking resolution via contractual arbitration must file a motion to stay. (§§ 1281.4, 1292.8, *Brock v. Kaiser*, *supra*, at pp. 1795–1796.) CBS met both requirements.

*C. Top Kick Failed to Demonstrate a Stay was Improper*

Top Kick, in arguing that the trial court correctly decided that the motion to disqualify CBS’s counsel must be heard before CBS’s petition to compel arbitration, fails to address either the mandatory language of section 1281.4, or the purpose of the statutory stay.<sup>3</sup>

To begin with, Top Kick contends that the disqualification motion must be heard first because it was filed first. This argument is made without citation to legal authority and must be rejected as meritless. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [“Every brief should contain a legal argument with citation

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<sup>3</sup> Top Kick makes no argument in support of the trial court’s denial of the stay, but only asserts the disqualification motion should have been heard first. Even assuming that were correct, the trial court should have continued the hearing on the stay rather than denying it.



to authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.”)]

Top Kick next maintains that CBS stipulated to have the disqualification motion heard on a certain date and did not inform Top Kick that it intended to file a petition to compel arbitration before that date. Neither the chronological order of the motions, nor complaints of nondisclosure in the parties’ stipulations, presents an exception to the statutory mandate.

Top Kick also argues that CBS filed “a belated arbitration motion to prevent the court from disqualifying the lawyer that filed it.” A stay, however, does not prevent the determination of the disqualification motion. A motion to disqualify counsel can be decided by an arbitrator and a stay presents no bar to its determination. (See *Benasra v. Mitchell Silberberg & Knupp* (2002) 96 Cal.App.4th 96 [arbitration panel decided disqualification motion], *Guseinov v. Burns* (2006) 145 Cal.App.4th 944, 949 [arbitrator denied defendant’s motion to disqualify plaintiff’s counsel].) Indeed, CBS and Top Kick contractually agreed in the 1999 agreement “that . . . the parties will submit such matters to arbitration in accordance with procedures to be negotiated in good faith.” They also agreed in the July 2011 agreement that “any disputes arising under this Settlement Agreement (including, without limitation disputes regarding its enforcement or interpretation) shall be subject to binding arbitration under the auspices of JAMS in Los Angeles, California.” As a result, the trial court’s role pending the motion to compel arbitration and motion to stay is ordinarily limited to a determination whether the dispute between the parties is subject to arbitration. (See *University of San Francisco Faculty Assn. v.*



*University of San Francisco* (1983) 142 Cal.App.3d 942, 947.)  
“Arbitration is, of course, a matter of contract, and the parties may freely delineate the area of its application. The court’s role . . . must be strictly limited to a determination of whether the party resisting arbitration agreed to arbitrate.” (*O’Malley v. Wilshire Oil Co.* (1963) 59 Cal.2d 482, 490-491.)

The federal cases cited by Top Kick for the proposition that disqualification is not a matter for the arbitrators to determine, *Simply Fit of North America, Inc. v. Poyner* (E.D.N.Y. 2008) 579 F.Supp.2d 371 and *Arbitration Between R3 Aerospace & Marshall* (S.D.N.Y. 1996) 927 F.Supp. 121, apply New York state law and federal law in the Second Circuit, both of which are contrary to California law. Top Kick ignores the California cases where disqualification motions have been decided by arbitrators and the recognition in *Benasra* that the arbitrator may be in the best position to make the disqualification determination. (*Benasra, supra*, 96 Cal.App.4th 96, 115.)

Top Kick further argues that public policy requires that the disqualification motion be decided first. Top Kick invokes an attorney’s duty of loyalty to clients and former clients, as well as an attorney’s duty to protect the confidentiality of client information. While there may be a case in which the disqualification motion relates to the determination of arbitrability so that the potentially disqualified lawyer should not be permitted to argue the motion to compel, section 1281.4 could potentially be read to permit the stay subject to hearing the disqualification motion. We need not decide that issue in this



case, as Top Kick conceded that the disqualification motion has nothing to do with arbitrability.<sup>4</sup>

Top Kick relies on *Schimmel v. Levin* (2011) 195 Cal.App.4th 81 (*Schimmel*) to argue that the stay was improper. The *Schimmel* court affirmed the trial court's decision to strike the defendant's petition to compel arbitration after finding that the lawyer who prepared it possessed confidential material information belonging to the plaintiff. Rejecting defendant's argument that the petition to compel arbitration should have been heard first, it relied upon the court's "inherent power in furtherance of justice, to regulate the proceedings of a trial before it. . . ." (*Ibid.* at p. 87, citing *People v. Miller* (1960) 185 Cal.App.2d 59, 77.)

In *Schimmel*, however, the party seeking to enforce the arbitration agreement did not move for a mandatory stay under section 1281.4, and therefore the issue presented here was not before the *Schimmel* court. Rather, the trial court in that case was at liberty to decide the disqualification motion first, while the trial court here is bound by section 1281.4.

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<sup>4</sup> Top Kick stated this position twice in its pleadings in this Court. "The only thing that Top Kick wants to litigate before discussing arbitrability is the disqualification motion. CBS will not be prejudiced by opposing the disqualification motion. That motion does not involve the merits. It has nothing to do with arbitrability and will have no effect on the parties' discussion of arbitrability or the Superior Court's resolution of the arbitration motion, if it gets to that." "The disqualification motion turns on a simple question: can Gatti, who used to represent Top Kick against CBS on matters related to *Walker, Texas Ranger*, turn on his former client and now represent CBS against Top Kick? That question has nothing to do with the arbitrability of this case."



*Schimmel* thus does not stand for the proposition that public policy always requires the trial court to hear a disqualification motion before a petition to compel arbitration when a party moves for a stay under section 1281.4. Here, the trial court erred in failing to recognize that a stay is required under California law. Under the plain language of the statute, the section 1281.4 stay was mandatory.

### **DISPOSITION**

Let a peremptory writ of mandate issue directing the trial court to vacate its order of August 10, 2018, denying petitioner's application to stay litigation pursuant to section 1281.4 pending the court's ruling on petitioner's petition to compel arbitration, and to enter a new order granting petitioner's application for a stay pursuant to section 1281.4. The trial court is ordered to hear and decide CBS's petition to compel arbitration.

ZELON, Acting P. J.

We concur:

SEGAL, J.

FEUER, J.